Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-23–120 OF 2009
SU GEOK YIAM J
28 APRIL 2013

Civil Procedure — Case management — Unlawful termination of employment — Undated agreement to resign — Refusal of employee to sign — Termination of employment by employer — Proceedings against employer in Industrial Court on ground of unfair dismissal — Whether documents in Industrial Court could be included in present suit — Whether documents public documents — Whether documents relevant

Civil Procedure — Res judicata — Estoppel — Whether reliance upon Industrial Court documents in civil suit prohibited by s 23 of the Evidence Act 1950

The plaintiff sued the defendants for damages for slander, malicious falsehood and conspiracy to injure. The plaintiff was the Malaysian Director of the first defendant. The second defendant was the Group Vice President while the third defendant was the Regional Human Resource Manager. The fourth defendant was the Vice President, Korea, Taiwan, Singapore and Malaysia. In an unlawful and devious attempt to terminate the plaintiff's employment, the third and fourth defendants presented an undated agreement ('the termination agreement') which was pre-signed by the second defendant. The plaintiff refused to resign voluntarily. The first defendant then terminated the plaintiff's employment on the ground that it no longer had any trust and confidence in the plaintiff. The plaintiff then initiated proceedings against the first defendant in the Industrial Court on the ground of unfair dismissal. In a case management in the present court, the plaintff's counsel prepared and filed in court an additional common bundle of documents ('the additional CBDs') which the plaintiff wished to rely upon for the purpose of the trial. The defendants raised an objection to the inclusion of the documents ('the three documents') which related to the case in the Industrial Court between the plaintiff and the first defendant. The three documents were the statement of case; the statement in reply; and the award by consent of the Industrial Court. The issue raised by the defendants was whether the three documents ought to be expunged from the CBDs; and whether the plaintiff could make any reference to the three documents or any issue arising from her claim in the Industrial Court case in the trial of the present suit. However, the plaintiff argued that the confidentiality clause was not a 'finality clause'; the three

documents were public documents under s 74 of the Evidence Act 1950 ('the Act'); the three documents were relevant as they were in respect of the unfair dismissal; the parties were bound by their pleadings and as such, the principle of estoppel applied; copies of the three documents were admissible in evidence; and the defendants did not object to the three documents on the sole ground of confidentiality.

Held, dismissing the claim:

(1) The court, accordingly, ordered the three documents to be expunged and to be excluded for use and reliance by the plaintiff for the purposes of the trial in the present suit. The court also ordered that the plaintiff be disallowed from referring to the three documents in the trial of the plaintiff's present suit (see para 66).

(2) Although the three documents were public documents, they were documents which were protected from disclosure and production in the trial of the plaintiff's present suit by virtue of the express terms of the settlement agreement arrived at by the parties in the Industrial Court case according to which substantial amounts of money has been paid to the plaintiff (see para 68).

(3) In view of the confidentiality of the communications made between the parties in respect of the Industrial Court's case and the express terms of the settlement agreement in respect of the Industrial Court's case, the three documents were protected from disclosure, production and admission during the full trial of the plaintiff's present suit on the ground that they were protected by s 23 of the Act from production as there was an express agreement between the parties to that effect (see para 74).

(4) By virtue of the express terms of the settlement agreement in respect of the Industrial Court's case where a substantial sum of money was paid to and accepted by the plaintiff on a 'strictly without prejudice basis', and without admission of liability whatsoever, the doctrine of estoppel was applicable to defeat the attempt by the plaintiff to rely on the three documents in the Industrial Court's case in the trial of the plaintiff's present suit for any purpose whatsoever, including the intention of the plaintiff's learned counsel to cross examine the defendants' witnesses on the alleged inconsistencies between the defendants' pleaded case in the Industrial Court's case and the defendants' pleaded case in the plaintiff's present suit (see para 75).

(5) The doctrine of res judicata was applicable to defeat the attempt of the plaintiff to rely on the three documents in the trial of the plaintiff's present suit for any purpose whatsoever, including the intention of the plaintiff's learned counsel to cross examine the defendants' witnesses on the alleged inconsistencies between the defendants' pleaded case in the IC

case and the defendants' pleaded case in the plaintiff's present suit. As the plaintiff had agreed and represented to the first defendant that she would not make any further claims relating to or arising out of the Industrial Court claim. In consideration of the out of court settlement between the parties, it would be clearly unconscionable for the plaintiff to now attempt to refer to the pleadings filed in the Industrial Court to rehash the issues which have already been settled between the parties. The court ought not to condone the unconscionable conduct of the plaintiff. To do so would be contrary to the spirit and intent of the settlement agreement and contrary to the representations made by the plaintiff to the first defendant prior to or at the time of the execution of the settlement agreement (see paras 75, 79–80).

(6) The argument put forth by learned counsel for the plaintiff to justify the inclusion of the three documents for use in the trial of the plaintiff's present suit ought to be allowed. It was precisely because of the express terms of the settlement agreement that the court ought not to allow the plaintiff to reopen the issue or issues in the Industrial Court case in this proceeding (see para 97).

[Bahasa Malaysia summary

Plaintif telah mengambil tindakan terhadap defendan-defendan bagi ganti rugi fitnah lisan, kepalsuan dengan niat jahat dan konspirasi untuk menjejaskan. Plaintif merupakan Pengarah Malaysia bagi defendan pertama. Defendan kedua adalah Timbalan Presiden Kumpulan manakala defendan merupakan Pengurus Sumber Manusia Serantau. Defendan keempat merupakan Timbalan Presiden, Korea, Taiwan, Singapura dan Malaysia. Dalam satu percubaan tidak sah dan menipu untuk menamatkan pekerjaan plaintif, defendan ketiga dan keempat telah memberikan kepadanya satu perjanjian yang tidak bertarikh ('perjanjian penamatan') yang telah ditandatangani oleh defendan kedua. Plaintif enggan meletakkan jawatan secara sukarela. Defendan pertama kemudiannya menamatkan pekerjaan plaintif atas alasan bahawa ia tidak lagi mempunyai kepercayaan dan keyakinan terhadap plaintif. Plaintif kemudiannya memulakan prosiding terhadap defendan pertama di Mahkamah Perusahaan atas alasan pemecatan tidak adil. Dalam pengurusan kes di mahkamah ini, peguam plaintif telah menyediakan dan memfailkan di mahkamah ikatan dokumen tambahan bersama ('CBD tambahan') yang ingin dijadikan sandaran oleh plaintif bagi tujuan perbicaraan. Defendan-defendan membangkitkan bantahan kemasukan dokumen-dokumen tersebut ('tiga dokumen tersebut') yang berkaitan dengan kes di Mahkamah Perusahaan antara plaintif dan defendan pertama. Tiga dokumen tersebut adalah pernyataan kes, pernyataan balasan dan award yang diberikan oleh Mahkamah Perusahaan. Isu-isu yang dibangkitkan oleh defendan-defendan adalah sama ada tiga dokumen tersebut wajar dikeluarkan daripada CBD; dan sama ada plaintif boleh membuat rujukan kepada tiga dokumen tersebut atau apa jua isu

yang berbangkit daripada tuntutannya dalam kes di Mahkamah Perusahaan dalam guaman ini. Walau bagaimanapun, plaintif menghujahkan bahawa klausa kerahsiaan bukanlah klausa muktamad; tiga dokumen tersebut merupakan dokumen awam di bawah s 74 Akta Keterangan 1950 ('Akta'); tiga dokumen tersebut adalah relevan kerana kesemuanya berkenaan pemecatan tidak adil; pihak-pihak terikat dengan pliding masing-masing dan oleh itu, prinsip estopel terpakai; salinan tiga dokumen tersebut boleh diterima sebagai keterangan; dan bahawa defendan-defendan tidak membantah tiga dokumen tersebut semata-mata atas dasar kerahsiaan.

Diputuskan, menolak tuntutan:

(1) Mahkamah memerintahkan tiga dokumen tersebut dikeluarkan dan tidak disertakan bagi kegunaan dan sandaran plaintif bagi tujuan perbicaraan dalam guaman ini. Mahkamah juga memerintahkan plaintif agar tidak dibenarkan daripada merujuk kepada tiga dokumen tersebut dalam guaman plaintif ini (lihat perenggan 66).

(2) Walaupun tiga dokumen tersebut adalah dokumen awam, kesemuanya merupakan dokumen yang dilindungi daripada didedahkan dan dikemukakan dalam perbicaraan guaman plaintif ini berdasarkan terma nyata dalam perjanjian penyelesaian yang diputuskan antara pihak-pihak di Mahkamah Perusahaan yang mana sejumlah besar wang telah dibayar kepada plaintif (lihat perenggan 68).

(3) Melihat pada kerahsiaan komunikasi antara pihak-pihak berkenaan kes Mahkamah Perusahaan dan terma nyata penyelesaian berkenaan kes Mahkamah Perusahaan, tiga dokumen tersebut dilindungi daripada didedahkan, dikemukakan dan diterima semasa perbicaraan penuh guaman plaintif ini atas alasan bahawa kesemuanya dilindungi oleh s 23 Akta daripada dikemukakan kerana terdapat terma nyata antara pihak-pihak (lihat perenggan 74).

(4) Berdasarkan terma nyata perjanjian penyelesaian berkenaan Mahkamah Perusahaan di mana sejumlah besar wang telah dibayar kepada dan diterima oleh plaintif atas 'dasar ketat tanpa prejudis' dan tanpa apa jua pengakuan liabiliti, doktrin estopel adalah terpakai untuk menghalang percubaan oleh plaintif untuk bergantung kepada tiga dokumen tersebut dalam kes di Mahkamah Perusahaan, dalam perbicaraan guaman plaintif ini bagi apa jua tujuan, termasuk niat peguam plaintif untuk memeriksa balas saksi-saksi defendan-defendan atas dakwaan percanggahan-percanggahan antara kes defendan-defendan yang diplidkan dalam kes di Mahkamah Perusahaan dan kes yang diplidkan oleh defendan-defendan dalam guaman plaintif ini (lihat perenggan 75).

(5) Doktrin res judicata adalah terpakai untuk menghalang percubaan plaintif untuk bergantung kepada tiga dokumen tersebut dalam

perbicaraan guaman plaintif ini bagi apa jua tujuan, termasuk niat peguam plaintif untuk memeriksa balas saksi-saksi defendan-defendan atas dakwaan percanggahan-percanggahan antara kes yang diplidkan oleh defendan-defendan di Mahkamah Perusahaan dan kes yang diplidkan oleh defendan-defendan dalam guaman plaintif ini. Oleh kerana plaintif telah bersetuju dan mewakili defendan pertama, dia tidak akan membuat tuntutan selanjutnya berkenaan atau berikutan tuntutan di Mahkamah Perusahaan. Sebagai balasan untuk penyelesaian di luar mahkamah antara pihak-pihak, adalah tidak adil untuk plaintif kini cuba merujuk kepada pliding yang difailkan di Mahkamah Perusahaan untuk mengulang semula isu-isu yang mungkin telah diselesaikan oleh pihak-pihak. Mahkamah tidak seharusnya membenarkan tindakan tidak adil plaintif. Berbuat sedemikian adalah bertentangan dengan semangat dan niat perjanjian penyelesaian dan bertentangan dengan representasi-representasi yang dibuat oleh plaintif kepada defendan pertama sebelum atau semasa pelaksanaan perjanjian penyelesaian (lihat perenggan 75, 79–80).

(6) Hujahan yang dikemukakan oleh peguam plaintif untuk memperjelaskan mengenai kemasukan tiga dokumen tersebut bagi penggunaan dalam perbicaraan dalam guaman plaintif ini seharusnya dibenarkan. Ia adalah bertetapan dengan terma nyata perjanjian penyelesaian menyatakan bahawa mahkamah tidak sewajarnya membenarkan plaintif membuka semula isu tersebut atau isu-isu di Mahkamah Perusahaan dalam prosiding ini (lihat perenggan 97).]

Notes

For cases on estoppel, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7195–7206.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Brian Mcteggart v Waterways Ireland & Anor [2009] NIQB 44, QBD (folld)

Central London Property Trust Limited v High Trees House Limited [1947] KB 130, KBD (refd)

Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA (refd)

Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors [2010] MLJU 1608; [2011] 10 CLJ 186, HC (refd)
Joedy Kanniah v Poliklinik & Hospital Veterina Sdn Bhd & Ors [1997] 5 CLJ 237, HC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217; [1993] 4 CLJ 201 (refd)
Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763, CA (refd)
Nahar Singh v Pang Hon Chin [1986] 2 MLJ 141 (refd)
Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489; [1999] 3 CLJ 577, CA (refd)
Perspective Management Services Sdn Bhd v Seganom Sdn Bhd [2004] 4 CLJ 466, CA (refd)
Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy [1997] 2 MLJ 105, SC (refd)
Societe Italo-Belge pour le Commerce etl Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd The Post Chaser [1982] 1 All ER 19, QBD (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494; [1986] CLJ 256, SC (refd)

Legislation referred to

Evidence Act 1950 ss 5, 11, 14, 15, 23, 74
Land Acquisition Act 1960
Protection from Harassment Order 1997 [NI] article 3
Rules of Court 2012 O 34 r 2(2), (3), O 38 r 10(1)
Rules of the Supreme Court 1980 [NI] O 18 r 19

Matthias Chang (Cheah Tien Eu with him) (Suhaimi Khor Zulkifli & Chang) for the plaintiff.
Mohd Arief Emran (Wong & Partners) for the defendants.

Su Geok Yiam J:

BACKGROUND

[1] The plaintiff filed this suit on 8 December 2009 vide a writ of summons, encl (1).

[2] In this suit the plaintiff is suing the first, third and fourth defendants for damages, inclusive of aggravated and exemplary damages for slander amounting to RM3m; the first, second, third and fourth defendants for damages, inclusive of aggravated and exemplary damages for malicious falsehood amounting to RM5m; and the second, third and fouth defendants for damages, for conspiracy to injure and inducing the first defendant to breach

its employment contract with the plaintiff, amounting to RM5m; with interest, costs and such further or other relief as the court deems fit.

[3] In a nutshell, the plaintiff is suing the four defendants for damages for slander, malicious falsehood and conspiracy to injure.

[4] The plaintiff contends that the three causes of action arose from and were related to the unlawful termination of the plaintiff's employment by the first defendant on 22 October 2009.

THE PLAINTIFF'S STATEMENT OF CLAIM

[5] In para 2 of her statement of claim, encl (2), filed on 8 December 2009, the plaintiff avers that at the material time the plaintiff was an employee of the first defendant, being employed by the first defendant as 'Director Malaysia' until her unlawful termination by the first defendant.

[6] The plaintiff avers, in the same paragraph of her statement of claim, that she has spent 20 years in the retail industry in New Zealand, Singapore and Malaysia and prior to and during her employment with the first defendant has established a reputation of intergrity and professionalism and is well known among the social and political circles in Malaysia and overseas.

[7] The plaintiff avers, in para 3 of her statement of claim, that the first defendant at all material times was the plaintiff's employer; in para 4 of her statement of claim, that the second defendant is the 'Group Vice President, Asia Pacific of Tiffany & Co'; in para 3 of her statement of claim, that the third defendant is the 'Regional Human Resource Manager, Asia of Tiffany & Co'; and in para 5 of her statement of claim, that the forth defendant is the 'Vice President, Korea, Taiwan, Singapore and Malaysia of Tiffany & Co'.

[8] The plaintiff avers, in para 7 of her statement of claim, that she was first employed by the first defendant on 29 September 2000, as 'Manager Malaysia' with primary responsibility for sales and based in the store/outlet in shopping mall more commonly known as the KLCC whereas the operations, administration and human resource and accounting were the responsibility of the then finance manager in Malaysia.

[9] The plaintiff avers, in para 8 of her statement of claim, that while so employed between 2000 and 2008 she was responsible for increasing the growth in sales by RM19,690,073 or 393.225% which equates to a compound growth of 18.6%pa.

[10] The plaintiff avers, in para 9 of her statement of claim, that since the start of the annual performance appraisal by the first defendant in 2004, the plaintiff was adjudged to have achieved the rating '5 High - frequently exceeds expectations' in the said appraisal for every year of service.

[11] The plaintiff avers, in para 17 of her statement of claim, that at 5pm on 3 August 2009, the third and fourth defendants presented an undated agreement (the 'termination agreement') which was pre-signed by the second defendant which in essence was an unlawful and a devious attempt to terminate the plaintiff's employment effective on 7 August 2009, ie within four days from the date of presentation of the termination agreement.

[12] The plaintiff avers, in para 18 of her statement of claim, that the termination agreement provides, inter alia, that following the discussion between the employee, ie the plaintiff, and Michelle Kim and Bianca So on 3 August 2009, the company without admission of any fault whatsoever, has agreed with the employee to enter this agreement on the terms and conditions hereinafter set out, and that the final employment date of the employee shall be 7 August 2009 ('final employment date').

[13] The plaintiff avers, in para 19 of her statement of claim, that the termination agreement provides, inter alia, that no later than seven working days following the final employment date, the plaintiff shall be paid all outstanding expenses claims; prorated accrued but unpaid salary up to the final employment date; payment in lieu of accrued but untaken annual leave; and an initial ex gratia payment equivalent to RM37,078 ('initial ex gratia'), as compensation for loss of employment.

[14] The plaintiff avers, in the same para 19 of her statement of claim, that the termination agreement also provides, inter alia, that no later than 90 working days following the final employment date, the plaintiff shall be paid the equivalent of four months salary, being a subsequent ex gratia payment ('subsequent ex gratia') as compensation for loss of employment which shall be payable by monthly installments of RM18,540 per month at the end of each month, provided always that the plaintiff has not breached the terms of the termination agreement and the company is satisfied that the plaintiff has not brought or initiated any claim or proceedings of whatsoever nature against the company including any claim in the Industrial Relations Department.

[15] The plaintiff avers, in the para 20 of her statement of claim, that the above provisions in the termination agreement constitute a devious attempt on the part of all the defendants to deny the plaintiff, her rights and entitlement under Malaysian employment laws for unlawful dismissal.

A THE DEFENDANTS' STATEMENT OF DEFENCE

[16] In their statement of defence, the defendants have denied the plaintiff's allegations of slander, malicious falsehood and conspiracy to injure and have put the plaintiff to strict proof of her allegations.

B

[17] The first defendant has alleged that as a result of the refusal of the plaintiff to resign voluntarily from the first defendant, the first defendant commenced an employment audit under instructions of Tiffany and Company, in New York following complaints received by anonymous employees regarding the management and operations of the first defendant by the plaintiff.

C

[18] This was followed by the issuance of notices of show cause to the plaintiff based on the employment audit report concerning various irregularities which were discovered in the employment audit since the plaintiff did not agree to voluntarily exit from the first defendant despite being given the opportunity to do so due to her position and seniority with the company. Formal investigations into the concerns raised in the employment audit were commenced.

D

E

[19] The particulars of the various matters are set out in the first defendant's statement of defence.

F

[20] The first defendant has relied on the defence of qualified privilege in order to protect the contents of the employment audit report and the communications in the emails from disclosure on the ground that they are confidential and are protected from disclosure and also on the defence of justification on the ground that the allegations made against the plaintiff are true.

G

[21] The particulars of the defences of qualified privilege and justification are set out in the first defendant's statement of defence.

H

[22] The first defendant has terminated the plaintiff's employment by letter dated 22 October 2009 on the ground that it no longer had any trust and confidence in the plaintiff to continue in her employment with the first defendant as the plaintiff had through her correspondence with the first defendant, consistently and continuously used derogatory, insolent and insubordinate language and unwarranted threats in her communication with her superiors, the second to the fourth defendants, the particulars of which are set out in the first defendant's statement of defence.

I

[23] The first defendant has also averred that the second to the fourth defendants were not the employees of the first defendant. Hence, the first defendant is not liable for their alleged acts of slander. Apart from that, the words are not defamatory of the plaintiff and were not published to third parties other than the plaintiff and that the publication to the plaintiff was done on an occasion of qualified privilege. Particulars of the defence of qualified privilege are set out in the first defendant's statement of defence.

[24] The first defendant has also averred that as the second to the fourth defendants were not the employees of the first defendant the first defendant is not liable for their alleged acts of conspiracy and/or malicious falsehood.

[25] The second and fourth defendants in their combined statement of defence state that they were not the employees of the first defendant. Apart from that averment, their denials and averments concerning the plaintiff's allegations of slander, malicious falsehood and conspiracy to injure are similar to those of the first defendant. They also rely on the defences of qualified privilege and justification, the particulars of which are set out in their combined statement of defence.

[26] The second to the fourth defendants have also included a counterclaim in their combined statement of defence against the plaintiff. It is for an injunction to restrain the plaintiff from further publishing the defamatory words and/or similar defamatory words of them, general damages, aggravated and exemplary damages, interest, costs and such further or other relief as this honourable court deems just.

[27] In her reply and defence, the plaintiff has joined issue with the second to the fourth defendants on their defence and has put them to strict proof on those matters not admitted therein.

[28] The plaintiff has relied on the defences of fair comment and justification in relation to the alleged defamatory statements. She has set out the particulars of the two defences in her reply and defence.

[29] The plaintiff has also averred that the counterclaim is an abuse of process of court, frivolous and vexatious and an embarrassment to the plaintiff.

[30] The plaintiff prayed that the counterclaim be dismissed, that the costs be taxed on a solicitor and client basis and such further or other relief as this honourable court deems fit.

[31] Subsequent to filing this suit, on 8 December 2009, the plaintiff was dismissed by the first defendant.

[32] The plaintiff then initiated proceedings against the first defendant, her former employer, for unfair dismissal, in the Industrial Court. She contended that her dismissal was without just cause and excuse.

OBJECTION OF THE DEFENDANTS DURING CASE MANAGEMENT TO THE INCLUSION OF THREE DOCUMENTS (FILED IN THE INDUSTRIAL COURT PROCEEDINGS) IN AN ADDITIONAL BUNDLE OF DOCUMENTS FILED FOR USE IN THE FULL TRIAL OF THE PLAINTIFF'S PRESENT SUIT

[33] The case came before me for case management on 9 October 2012.

[34] On that date, the plaintiff's learned counsel informed me that he had prepared and filed in court an additional common bundle of documents ('the additional CBDs') which the plaintiff wished to rely upon for the purposes of the trial of this suit. The defendants' learned counsel then raised an objection to the inclusion of the documents at pp 68–86 in the additional CBDs on the ground that they are confidential and could not be relied upon by the plaintiff in the trial of this suit.

[35] The documents at pp 68–86 are documents which relate to the case in the Industrial Court between the plaintiff and the first defendant in respect of the alleged unfair dismissal of the plaintiff by the first defendant.

THE THREE INDUSTRIAL COURT DOCUMENTS

[36] The three Industrial Court documents are as follows:

(a) the statement of case;

(b) the statement in reply; and

(c) the award by consent of the Industrial Court ('the three documents').

[37] I had directed both parties to submit on the following preliminary issues which had arisen as a result of the objection raised by learned counsel for the defendants:

(a) whether the three documents ought to be expunged from the common bundle of documents filed by the plaintiff for the trial of this suit; and

(b) whether the plaintiff can make any reference to the three documents or any issue arising from her claim in the IC case in the trial of this suit?

THE PLAINTIFF'S SUBMISSIONS

[38] The plaintiff's learned counsel submitted that the preliminary issues ought to be answered in favour of the plaintiff, ie that the first issue ought to be decided in the negative and the second issue ought to be decided in the affirmative, and the objection by the defendants' learned counsel ought to be dismissed on six grounds.

[39] The six grounds are as follows.

[40] Firstly, the confidentiality clause referred to by the learned defendants' counsel is worded as follows:

> (ii) The *terms of the settlement* are to be kept strictly confidential and not to be disclosed by Barbara Lim to any third party, save that Barbara Lim may disclose the terms of settlement to her solicitors and/or tax advisors. (Emphasis added.)

[41] Since it is worded in that manner it is not a 'finality clause' as suggested by learned counsel for the defendants but merely a limited confidentiality clause which is confined solely to the terms of the settlement in the Industrial Court case. It is not an absolute and all-encompassing confidentiality clause extending to all the documents filed in that Industrial Court case including the three documents.

[42] The Industrial Court documents are not covered by the above confidential clause because they do not contain or disclose the terms of settlement. The plaintiff is, therefore, perfectly entitled to include the Industrial Court documents in the additional CBDs as the three documents are not protected from the privilege from disclosure in the present suit.

[43] Secondly, the three documents are in fact public documents pursuant to s 74 of the Evidence Act 1950. The reason is that the documents have been filed in the Industrial Court, they are kept in the records of the Industrial Court and anyone on payment of a fee will be able to do a file search and obtain copies of the three documents.

[44] There is nothing confidential or secretive about the three documents. It is settled law that pleadings are statements of fact relied on by the respective parties to substantiate their case before the court. Therefore, no confidentiality

can ever be attached to pleadings. The determination of the truth ought to outweigh the private right to confidentiality and the public interest in protecting that confidentiality.

[45] In support of his submissions learned counsel for the plaintiff cited *Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors* [2010] MLJU 1608; [2011] 10 CLJ 186.

[46] In that case Mah Weng Kwai J (now JCA) allowed affidavits that were filed in a previous Originating Summons No D-24-NCC-67 of 2010 to be disclosed and included by the plaintiff in its bundle of documents filed for the present Suit No D-22-NCC-146 of 2010.

[47] The learned judge said as follows at p 196:

> The affidavits of the SMM witnesses were filed in the SSM OS case in court. *Once filed the affidavits are public documents and are said to be in the public domain*. Although the SSM OS did not proceed to trial as a consent judgment was entered into between the SSM and the second and fifth defendants, *the affidavits were nonetheless before the court and would have been deemed read by the learned judge. Any person on payment of a fee will be able to do a file search and take copies of the affidavits*. (Emphasis added.)

[48] And as follows at p 198:

> … it is always in the best interests of justice that *all relevant documents and information be placed before the court during trial to enable the court to arrive at a just decision*, thus the calling of the SSM witnesses for the purpose of admitting the impugned evidence will no doubt assist the court in arriving at the truth of the issues at hand. *The determination of the truth ought to outweigh the private right to confidentiality and the public interest in protectiing confidentiality.*

[49] Thirdly, since the present suit by the plaintiff against the defendants is for slander, malicious falsehood and conspiracy to injure which has arisen from and is related to the termination of the plaintiff's employment by the first defendant the three documents are relevant in the trial of the present suit because they are in respect of the unfair dismissal of the plaintiff from her employment by the first defendant without just cause and excuse notwithstanding that the Industrial Court case was settled between the parties.

[50] Leaving the terms of the settlement aside, the plaintiff intends to show at the full trial, where applicable, the consistencies and inconsistencies between the pleadings filed in the Industrial Court case by the first defendant and the

pleadings filed in this suit by the first defendant. This is essential to the plaintiff's case because one of the defences pleaded by the defendants in this suit is justification.

[51] Learned counsel for the plaintiff has cited ss 11, 14 –15 of the Evidence Act 1950 and three cases in support of his submissions.

[52] The three cases are as follows:

(a) *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 4 CLJ 201;

(b) *Nahar Singh v Pang Hon Chin* [1986] 2 MLJ 141; and

(c) *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] 1 All ER 763.

[53] In *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 4 CLJ 201 the Supreme Court held as follows:

> Where the purpose of adducing evidence of similar facts or similar offences is justifiable on grounds of relevancy and necessity to rebut any defence which would otherwise be open to the accused, it is admissible in evidence provided the probative value of such evidence outweighs its prejudicial value.

[54] In *Nahar Singh v Pang Hon Chin* [1986] 2 MLJ 141 Edgar Joseph Jr (as he then was) said as follows at p 144:

> … in my view such evidence was relevant and admissible under the provisions of s 15 of the Evidence Act 1950 to rebut the defence raised.

[55] In *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] 1 All ER 763 the English Court of Appeal held as follows:

> In civil cases the court would admit evidence of similar facts if it was logically probative and it was not oppressive or unfair to the other side to admit the evidence.

[56] Fourthly, parties are bound by their pleadings and as such the principle of estoppel is applicable. He cited *Joedy Kanniah v Poliklinik & Hospital Veterina Sdn Bhd & Ors* [1997] 5 CLJ 237 in support of his submission.

[57] In that case Abdul Kadir Sulaiman J (as he then was) said as follows:

> The hearing before the Industrial Court is based on a statement of case by the workman and a statement in reply by the employer. Each is the pleading by the party. It is trite law that parties to an action are bound by their pleadings and this includes proceedings before the Industrial Court.

[58] Fifthly, pursuant to O 38 r 10(1) of the Rules of Court 2012 office ('ROC 2012') copies of the three documents which are documents filed in the registry of the Industrial Court are admissible in evidence in the present suit to the same extent as the original would be admissible.

[59] Finally, the defendants' learned counsel did not object to the three documents on the ground that they are irrelevant. He had only raised the objection to the inclusion of the three documents on the sole ground of confidentiality. It meant that he had tacitly admitted or conceded that the documents are relevant in the present suit.

[60] It is trite law that all relevant documents must be put before the court so that the court can determine the truth, and ultimately arrive at a fair and just decision of the plaintiff's suit at the end of the full trial.

[61] Under these circumstances, there is no legal impediment for the inclusion of the three documents in the additional CBDs filed in this suit.

THE DEFENDANTS' OBJECTION AND SUBMISSIONS

[62] The defendants anchored their objection to the disclosure of and reference to the three documents and any issue arising from the plaintiff's claim in the IC case on three grounds and submitted that the plaintiff should not be allowed to file the additional bundle of documents containing the three documents for use and reference in the plaintiff's present suit.

[63] The three grounds are as follows:

(a) the plaintiff is estopped from relitigating and reopening the issues in the Industrial Court case by referring to any of the three documents in the plaintiff's present suit as the issues raised in the Industrial Court case have been amicably settled between the parties upon the payment of a substantial sum of money to the plaintiff and the plaintiff and the first defendant have agreed that the plaintiff is not entitled to file or pursue any further claims pertaining to the Industrial Court case (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331; [1995] 4 CLJ 283; *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84; and *Perspective Management Services Sdn Bhd v Seganom Sdn Bhd* [2004] 4 CLJ 466);

(b) the attempt by the plaintiff to use the three documents in the trial of the present suit is an abuse of process based on the doctrine of res judicata as there should be a finality to the Industrial Court case (see *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ 256;

Perspective Management Services Sdn Bhd v Seganom Sdn Bhd [2004] 4 CLJ 466; and *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75); and

(c) any reliance on any of the three documents is contrary to the spirit and the terms of the settlement agreement in respect of the Industrial Court case and would constitute a breach of the settlement agreement (see *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489; [1999] 3 CLJ 577; and *Brian Mcteggart v Waterways Ireland & Anor* [2009] NIQB 44).

THE UNDISPUTED FACTS

[64] The defendants have relied on the following undisputed facts:

(a) the first defendant and the plaintiff had agreed to an amicable settlement of the issues arising in the above mentioned Industrial Court claim which is attached in the letters, issued by the solicitors involved in the Industrial Court proceedings, which were both dated 8 July 2001;

(b) the terms of settlement clearly state, inter alia, as follows:

(i) the terms of settlement are confidential and are only to be released to any third party with the consent of the other party;

(ii) the Industrial Court action is withdrawn without liberty to file afresh and the claim is struck off by the Industrial Court; and the settlement of the Industrial Court claim of the plaintiff was expressly made without prejudice to the plaintiff's present defamation suit which was already pending at the High Court at that time, ie on a 'strictly without prejudice basis', and without admission of liability whatsoever; and

(iii) the settlement of the Industrial Court claim of the plaintiff was expressly made without prejudice to the plaintiff's present defamation suit which was already pending at the High Court at that time, ie on a 'strictly without prejudice basis', and without admission of liability whatsoever;

(c) the disclosure of the terms of the settlement agreement in respect of the plaintiff's claim in the Industrial Court in the present suit were made pursuant to the direction of this court and with the consent of the plaintiff's solicitors at the last case management on 9 October 2012;

(d) the defendants reserve their rights and reiterate that the terms of settlement and the existence of the Industrial Court claim were only disclosed in the present case management proceedings for the purpose of

opposing the disclosure and admission of and reference to the three documents in the trial of the plaintiff's present suit and for the exclusion of the additional bundle of documents which contain the three documents; and

(e) the defendants reiterate that the three documents and the existence of the dispute in the Industrial Court case are not to be adduced at the trial of the present suit in any form whatsoever.

THE DECISION OF THE COURT

[65] Having considered the oral and written submissions of both learned counsels, the court agreed with and accepted the submissions of learned counsel for the defendant.

[66] The court, consequently, decided the preliminary issues in favour of the defendants. The court, accordingly, ordered the three documents in the additional CBDs to be expunged and to be excluded for use and reliance by the plaintiff for the purposes of the trial in the present suit. The court also ordered that the plaintiff be disallowed from referring to the three documents in the trial of the plaintiff's present suit.

Being dissatisfied with the decision of the court, the plaintiff has filed a notice of appeal against the decision of the court to the Court of Appeal.

THE REASONS FOR THE DECISION OF THE COURT

[67] The reasons for the decision of the court are as follows:

[68] Firstly, the court was of the view that although the three documents are public documents they are documents which are protected from disclosure and production in the trial of the plaintiff's present suit by virtue of the express terms of the settlement agreement arrived at by the parties in the Industrial Court case ('IC case') according to which substantial amounts of money has been paid to the plaintiff. Therefore, the cases, cited by the learned plaintiff counsel to support their disclosure, production, admission and reference in the plaintiff's present suit, are with respect distinguishable on facts and inapplicable.

THE RELEVANCY, ADMISSIBILITY AND DOCUMENTS PROTECTED FROM PRODUCTION

[69] Section 5 of the Evidence Act 1950 ('EA') expressly allows evidence to

be given of facts in issue and relevant facts. However, the explanation to the section limits the scope of the section by disallowing any person from giving evidence of a fact which the person is disentitled to prove by the law relating to civil procedure. The section and the explanation read as follows:

CHAPTER II

RELEVANCY OF FACTS

General

Evidence may be given of facts in issue and relevant facts

5. Evidence may be given in any suit or proceeding of the existence or non-existence or every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation - This section shall not enable any person to give evidence of a fact which he is disentitled to prove by the law relating to civil procedure.

ILLUSTRATIONS

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At As trial the following facts are in issue:

A's beating B with the club;

A's causing B's death by the beating; and

A's intention to cause B's death.

(b) A a party to a suit does not comply with a notice given by 8 the other party to produce for B's inspection a document referred to in A's pleadings. This section does not enable A to put the document in evidence on his behalf in that suit, otherwise than in accordance with the conditions prescribed by the law relating to civil procedure.

[70] Section 23 of the EA expressly disallows a person from proving an admission in a civil case if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

[71] The section reads as follows:

Admissions in civil cases when relevant

23. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

A Explanation - Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 126.

B **[72]** The following excerpts from *Halsbury's Laws of Malaysia*, Vol 1, pp 405–406, 435–436 are also relevant and are applicable to the facts of the instant case:

C [10.3.323] Documents protected from production … The grounds on which this protection can be claimed can be classified under the following main heads: (1) legal professional privilege (see [10.3.314]; (2) public interest immunity (see [10.3.346] and following); (3) that the documents in question may tend to incriminate the party or his or her spouse (see [10.3-354]; (4) that the production is contrary to some statutory provision which imposes secrecy (see [10.3.355]); (5) that production is contrary to some express or implied agreement between the parties D (see [10.3.356]); and (6) that production would, in the circumstances of the particular case, be oppressive (see [10.3.357]). The first five of these grounds protect documents from disclosure at the trial as well as on discovery, and are also grounds for refusal to answer interrogatories (see [10.3.398]) or questions asked of a witness at the trial (see [10.3.353]-[10.3.354]). None of these grounds, except 'oppression', is now based on the discretionary power of the court (They are either statutory or E have become definite rules based on case law) … for 'confidentiality' is not a separate head of privilege (Disclosure of medical reports is not permissible if such would be harmful to the mental health of the applicant), although it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest.

F [10.3.356] Agreement not to disclose; 'without prejudice' communications An agreement between the parties not to disclose a particular document or information is a ground for refusing discovery of that document or information, (see *Rabin v Mendoza & Co* [1954] 1 All ER 247, ; [1954] 1 WLR 271, CA (Eng); *Berry and Stewart v Tottenham Hotspur Football and Athletic co Ltd*

G [1935] Ch 718 at 727; *Whiffen v Hartwright* (1848) 11 Beav 111; *Turney v Bayley* (1864) 4 De GJ & Sm 332.) Such an agreement may be implied; for example, correspondence during negotiations marked 'without prejudice' between the parties will not be ordered to be produced for inspection. 'Without prejudice' statements are only protected from production where they are made in the course of bona fide H negotiations for the settlement of a dispute, (see *Re Daintrey* [1893] 2 QB 116. Indeed, it is not strictly necessary so to mark documents, since the common law will grant such a privilege even without express marking: *Pirie v Wyld* (1886) 11 OR 422 at 427; *Cameron Packaging Ltd v Ruddy* (1983) 41 CPC 154 at 194. The heading will have no effect in the following cases: (1) where an agreement as to the settlement of the dispute has been reached (*Rush & Tomkins Ltd v Greater London Council* I [1989] AC 1280; [1988] 3 All ER 737, HL);

… The privilege attaching to statements made to persons acting as conciliators in matrimonial disputes is also based on an implied agreement that such statements are made 'without prejudice' (see *Mole v Mole* [1951] P 21 at 24; [1950] 2 All ER 328, CA (Eng) at 329, per Denning LJ).

In Malaysia the law on without prejudice communications is governed by legislation. Evidence Act 1950 (Act 56) s 23. Thus the common law will apply only where it is not inconsistent with the relevant legislation. However, although the legislation states the principles, the detailed rules are to be gathered from the cases. See *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] 3 MLJ 328; *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 (where the communications lead to a settlement, then the court will admit the communications in order to determine the terms of the settlement); *Wong Nget Thau v Tay Choo Foo* [1994] 3 MLJ 723 (The fact that a document is headed 'without prejudice' does not conclusively or automatically render it privileged from admission in evidence); *Boss s/o Ramasamy v Penang Port Sdn Bhd* [1996] 5 MLJ 511.

[73] In *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, CA (Eng); the English Court of Appeal decided that the party wishing to have the document discovered must show that the document is prima facie relevant. Brett LJ said as follows at p 38:

A document is not 'material', unless it relates to the subject matter of the action, and the documents of which production is sought do not relate to the question in dispute

[74] In view of the confidentiality of the communications made between the parties in respect of the IC case and the express terms of the settlement agreement in respect of the IC case I am of the view that the three documents are protected from disclosure, production and admission during the full trial of the plaintiff's present suit on the ground that they are protected by s 23 of the EA from production as there was an express agreement between the parties to that effect.

THE ESTOPPEL

[75] Secondly, by virtue of the express terms of the settlement agreement in respect of the IC case where a substantial sum of money was paid to and accepted by the plaintiff on a 'strictly without prejudice basis', and without admission of liability whatsoever, the doctrine of estoppel is applicable to defeat the attempt by the plaintiff to rely on the three documents in the IC case in the trial of the plaintiff's present suit for any purpose whatsoever, including the intention of the plaintiff's learned counsel to cross examine the defendants' witnesses on the alleged inconsistencies between the defendants' pleaded case in the IC case and the defendants' pleaded case in the plaintiff's present suit.

[76] The doctrine of estoppel is one of the most flexible and useful principle in the armoury of law (per Lord Denning, the most eminent of judges, in *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 (the *'Amalgamated Investment* case'). In

Central London Property Trust Limited v High Trees House Limited [1947] KB 130 Denning J had breathed new life into the doctrine of equitable estoppel (per Robert Goff J in *Societe Italo-Belge pour le Commerce etl Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd The Post Chaser* [1982] 1 All ER 19 at pp 26–27). The doctrine of estoppel has, subsequently, been further developed and applied by the courts in England and in Malaysia, depending on the facts and circumstances of each case, in order to do justice to the parties in each case. It has been described by Gopal Sri Ram JCA (later FCJ) as a doctrine of wide utility and has been resorted to by the courts to achieve justice and to prevent injustice in various factual matrix in numerous cases.

[77] The law pertaining to estoppel in Malaysia is succinctly laid down in the Federal Court case of *Boustead Trading v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where Gopal Sri Ram JCA (later FCJ) stated as follows at pp 344–348 (MLJ); 294h–297h (CLJ):

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
>
> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Templeton v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952 …
>
> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at p 122) as follows:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law — whether due to misrepresentation or mistake no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give other such remedy as the equity of the case demands.* (Emphasis added.)
>
> In *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113 an appeal from Brunei Darussalam, the Privy Council, said that the decision in the *Taylor Fashions*' case:

showed that, in order to found a propriety estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did: it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the representee to make per Lord Browne-Wilkinson at p 117. …

In *MAA Holdings v Ng Siew Wah* [1986] 1 MLJ 170, George J (now JCA) was faced with a case where the defendant had remained silent while the purchaser paid monies to him. Of the defendant's silence that learned judge said:

Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the height of inequity. Robert Goff J stated the principle of this aspect of equitable estoppel in *Societe Halo-Beige v Palm Oils* [1982] 1 All ER 19, at pp 26–27 thus:

> The fundamental principle is that stated by Lord Cairns LC, viz, that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v High Trees House Ltd* [1946] 1 All ER 256; [1947] KB 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in the rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higer rate specified in the lease. Furthermore it would be open to the court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice.

Lord Denning in *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 said:

If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

Before we conclude on the law upon the subject at hand, there are two elements of the doctrine of estoppel which we think require clarification and re-statement. The first concerns the effect which the representation or encouragement had upon the mind of the person relying upon the estoppel: the second has to do with the requirement that such a person should have acted to his detriment.

The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so influenced by the encouragement or representation … that it would be unconscionable for the representor to enforce his strict legal rights'. (Per Robert Goff J in *Amalgamated Investment* at p 105 of the report.)

Taking now the requirement of detriment, it is quite apparent that in the early development of the doctrine, there are to be found in the judgments of eminent judges statements 'indicating that one who relies upon an estoppel must prove that he relied upon his opponent's conduct and in consequence acted to his detriment. And this view had found its way into the equity jurisprudence of Malaysia. (See, for example, *Wong Juat Eng v Then Thaw Eu* [1965] 2 MLJ 213.) As has been seen, the former requirement, namely, that there ought to have been reliance was exploded by the decisions in *Amalgamated Investment*, in *Taylor Fashions* in *Societe Italo-Belge* (sub nom 'The Post Chaser') and *Lim Teng Huan*.

We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. All that need be shown is that in the particular circumstances of a case it would be unjust to permit the representor or encouragor to insist upon his strict legal rights. In the resolution of this issue, a judicial arbiter would, when making his assessment of where the justice of the case lies, be entitled to have regard to the conduct of the litigant raising the estoppel. This may, but need not in all cases, include the determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment.

RES JUDICATA

[78] Thirdly, by virtue of the express terms of the settlement agreement in respect of the IC case where a substantial sum of money was paid to and accepted by the plaintiff on condition that the IC action was withdrawn without liberty to file afresh and the claim struck out and the plaintiff's claim in the IC has been struck out, the doctrine of res judicata is applicable to defeat the attempt of the plaintiff to rely on the three documents in the IC case in the trial of the plaintiff's present suit for any purpose whatsoever, including the

intention of the plaintiff's learned counsel to cross examine the defendants' witnesses on the alleged inconsistencies between the defendants' pleaded case in the IC case and the defendants' pleaded case in the plaintiff's present suit.

[79] As the plaintiff had agreed and represented to the first defendant that she will not make any further claims relating to or arising out of the IC claim in consideration of the out of court settlement between the parties, it would be clearly unconscionable for the plaintiff to now attempt to refer to the pleadings filed in the IC to rehash the issues which have already been settled between the parties.

[80] On this ground alone, the court ought to exclude and expunge the three documents and disallow the plaintiff from making any reference to the three documents or any issue arising from her claim in the IC case in this proceeding. The court ought not to condone the unconscionable conduct of the plaintiff. To do so would be contrary to the spirit and intent of the settlement agreement and contrary to the representations made by the plaintiff to the first defendant prior to or at the time of the execution of the settlement agreement.

[81] The law on res judicata is founded on the rationale that it would be unjust to allow a party a second bite of the cherry. In this case, the aggrieved party is the plaintiff but she has already been compensated by the other party without admission of liability in respect of her claim in the IC case. Therefore, the court cannot allow her to utilise the three documents to prove the alleged inconsistencies between the three documents and the pleadings filed in the instant case.

[82] To do so would be to condone and encourage such unconscionable conduct on her part to renege on her promises which are contained in the settlement agreement. If the plaintiff had insisted on having the issues ventilated, she should not have agreed to the terms of the settlement. She should have those issues adjudicated before the IC. It is too late in the day for the plaintiff to have a change of heart concerning her consent and acceptance of the terms of the Settlement Agreement, having agreed to amicably settle the dispute in the IC without insisting on a trial of her claim in the IC.

[83] In *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ 256, the Supreme Court struck down the attempt by the respondent by way of the instant proceedings to relitigate and re-open an earlier action on two grounds, ie res judicata and abuse of process. It held as follows in the head notes at pp 498–499 (MLJ); 257 (CLJ):

> [9] The appellants' plea of res judicata is well taken and is supported by authority. *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 at pp 165–166 applied.

A [10] There is the inherent jurisdiction of the court where res judicata is not strictly established, and where estoppel per rem judicatam has not been sufficiently pleaded or made out, but nevertheless the circumstances are such as to render any re-agitation of the questions formally adjudicated upon a scandal and an abuse, to dismiss the action, stay proceedings, or strike out the defence thereto. *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1979] AC 411 applied.

B

[11] The attempt by way of the instant proceedings to relitigate and re-open the earlier action is a clear instance of an abuse of the process of the court. *Hunter v Chief Constable of the West Midlands Police and Ors* [1982] AC 529 at p 542 per Lord Diplock applied.

C

[12] The first warrant of execution of sentence lapsed on the stay granted at the instance of the respondent and the second warrant was inevitable and necessary when that stay was lifted.

D

[84] Eusoffe Abdoolcader SCJ who delivered the judgment of the Supreme Court allowing the appellants' appeal with costs said as follows at pp 498–499 (MLJ); 261c–262a (CLJ):

The earlier action instituted by the respondent on 2 July 1985 and which was struck E out sought relief on the ground of discrimination in breach of article 8 of the Constitution but in the present proceedings the grounds for relief have been augmented and declarations sought to the effect we have indicated earlier. The appellants plead res judicata in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy F Council in *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 (at pp 165–166) and a catenation of cases to the like effect, namely, that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which G the parties, exercising reasonable diligence, might have brought forward at the time.

There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppel per rem judicatam has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court H *will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require.* It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1979] AC 411 (at p 425):

I

> The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this

doctrine is contained in the judgment of Wigram V-C in *Henderson v Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the board, there described in these words:

> … *there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings, matters which could and therefore should have been litigated in earlier proceeding (p 590.)* (Emphasis added.)

The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police and Ors* [1982] AC 529 (at p 542). (Emphasis added.)

[85] In *Perspective Management Services Sdn Bhd v Seganom Sdn Bhd* [2004] 4 CLJ 466, the Court of Appeal held that even if there is a reservation in respect of a certain issue or claim in a consent order entered into by the parties in a previous proceeding, that reservation is ineffective to prevent estoppel and res judicata from arising against the party concerned in a subsequent proceeding.

[86] This is what Mokhtar Sidin JCA said in delivering the majority judgment of the Court of Appeal at pp 487d-f, 490e-h and 491a:

> In our view, when the respondent entered into a consent order with the defendants (including the appellant in the present suit), the parties came to a compromise whereby amongst others the respondent was declared to be the beneficial owner of those shares and the appellant was given 48 hours to split up those shares and deliver the scripts to the respondent. *Further, we are of the view that since the consent order was a compromise, those claims and relief in the first suit not stated in that order, are deemed to have been abandoned. If any issue or claim or relief was reserved to be litigated later, it must be clearly shown in the order such as the parties be given liberty to do so. We could not find any reservation or liberty in respect of those claims against the appellant being given in that consent order. For that reason, we are of the view that res judicata and estoppel applies to the present suit* …
>
> Even assuming that there was a reservation, what is the effect of the reservation? This issue was answered by *SCF Finance Co Ltd v Mash & Anor (No 3)* [1987] 1 All ER 194 where the Court of Appeal in England held that *even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party, where the said party had pleaded that issue but elected not to proceed on that issue in the previous proceeding. It was held she was not entitled to assert the issue afresh in subsequent proceedings, even if that issue was not heard and determined or if it was 'reserved'. In our view, the reservation as found by the learned*

judge would not help the respondent in their case. As pointed out, the issues raised in the statement of claim in the present suit are exactly the same issues being raised against the appellant in the first suit. The respondent attempted to distinguish the two suits by stating that the claim in the first suit was for wrongful conversion while in the present suit it is for wrongful detention. As we have stated earlier, we find that in both suits the main claim of the respondent is for wrongful detention. Even if it is true as what the respondent has stated, we agree with the appellant's counsel that taking into consideration the facts in both claims, the claim for wrongful conversion in the first suit and wrongful detention in the present suit are claims of the same nature because wrongful conversion involves the element of wrongful detention. Following the decision of *SCF Finance Co v Mash & Anor Ltd (No 3)*, it is clear to us that the appellant has every right to raise the issue of res judicata to strike out the writ and the statement of claim in respect of the present suit. (Emphasis added.)

[87] Before me, learned counsel for the plaintiff has argued that the case cited above by learned counsel for the defendants is distinguishable on facts as the consent order was entered into in respect of a previous proceeding whereas the settlement agreement was entered into in respect of a subsequent proceeding. Hence, the reservation in the settlement agreement in respect of the plaintiff's causes of action founded on slander, malicious falsehood and conspiracy to injure in the previous proceeding, ie the plaintiff's present suit, could not be defeated by the doctrines of estoppel and res judicata.

[88] With respect, I am unable to agree with him. From my understanding of the ratio decidendi and the reasoning of the learned judge in that case, if any of the issues which is pending in the plaintiff's present suit cannot be heard or tried without breaching the terms of the settlement agreement, then the issue is considered to have been finally determined by the parties once the settlement agreement has been entered into and the plaintiff is estopped from raising it in the trial of the present suit as the plaintiff had represented and encouraged the first defendant to believe that that was the plaintiff's intention. Based on my understanding, it is immaterial whether the reservation is of a previous suit or of a latter suit. What is material is whether it would be unjust and inequitable for the plaintiff to rely on the three documents in the trial of the plaintiff's present suit.

[89] A comparison of the two cases, ie this case and the IC case, would also show that what is common in the two cases is the alleged unfair or unlawful dismissal of the plaintiff from the first defendant's employment or the alleged unfair or unlawful termination of the plaintiff's employment by the first defendant. Hence, as the plaintiff has accepted a substantial sum of money from the first defendant in settlement of her claim in the IC for the unfair or unlawful dismissal of the plaintiff from the first defendant's employment without admission of liability on the part of the first defendant the plaintiff is

estopped from relying on the three documents as the three documents are connected or related to this issue on the grounds of estoppel and res judicata.

[90] If the plaintiff should now discover or realise that she ought not to have agreed to the express terms of the settlement agreement as her decision has prejudiced the manner in which she is desirous of conducting her present suit against the defendants including the first defendant for the three causes of action of slander, malicious falsehood and conspiracy to injure, including her intention and desire to cross-examine the witnesses in the instant case concerning the contents of the three documents and any issue arising from the IC case then the fault or blame lies with her and not with the first defendant.

[91] In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75, the Federal Court held in a dissenting judgment delivered by Peh Swee Chin FCJ that the doctrine of res judicata would apply to bar the making of the third order of 22 September 1995 (the 'third order') because the second order of 8 October 1990 had become the truth between the landowners and the charge, and the third order would constitute a challenge to the truth or accuracy of the second order. The learned judge, consequently, held that the High Court should have exercised its inherent jurisdiction and dismissed the fresh subsequent proceeding in which the third order was made, by relying on the doctrine of res judicata even though it was not pleaded by any of the parties.

[92] The learned judge cited thre cases in support of his decision. The three cases are as follows:

(a) *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494;

(b) *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 202 (FC); and

(c) *Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy* [1997] 2 MLJ 105 (SC).

THE ABUSE OF PROCESS

[93] Fourthly, to allow the plaintiff to rely on the three documents in the trial of the plaintiff's present suit against the defendants against the backdrop of the express terms of the settlement agreement would be tantamount to allowing the plaintiff to abuse the process of the court by rehashing the issues in order to benefit the plaintiff twice over and to cause detriment and damage to the defendants in the present suit.

[94] It is trite law that the process of the court is to be used by an aggrieved party to institute and prosecute a bona fide claim against a party perceived as the wrongdoer who has caused harm, injury, damage or loss to him. The process of the court ought not to be used for a collateral purpose to damage or cause loss to another party.

[95] As stated earlier in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ 256 (Rep) the Supreme Court held that the court has an inherent jurisdiction to dismiss an action, or stay the proceedings or strike out the defence, as the case may require, where the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse of the process of the court.

[96] Similarly, here since the undisputed facts show that the settlement agreement was in full and final settlement of the plaintiff's claim in the IC case without admission of liability and with a confidentiality clause, there is no justification for the inclusion of the three documents in the additional bundle of documents for use in the full trial of the plaintiff's present suit or to make any reference to the three documents and their contents in the trial of the plaintiff's present suit. To allow the inclusion would be to allow the plaintiff to abuse the process of the court and to cause injustice to the first defendant by allowing the plaintiff to reopen and relitigate the matters stated in the three documents.

[97] In my judgment, the argument put forth by learned counsel for the plaintiff to justify the inclusion of the three documents for use in the trial of the plaintiff's present suit, ie that since the matters stated in the three documents were not litigated in the IC the plaintiff ought to be allowed to rely on them to establish consistency or inconsistency with the first defendant's pleadings in the plaintiffs present suit, has no merit. The reason is simple. It is precisely because of the express terms of the settlement agreement that the court ought not to allow the plaintiff to reopen the issue or issues in the IC case in this proceeding.

[98] Furthermore, the matters in the IC case were not even pleaded in the plaintiff's present suit against the defendants as the IC case was only commenced by the plaintiff against the first defendant after the filing of the present suit by the plaintiff against the defendants.

THE BREACH OF THE SETTLEMENT AGREEMENT

[99] Finally, the court ought not to allow a litigant, ie the plaintiff in this proceeding, to benefit from its own wrong, ie to benefit from breaching the terms of the settlement agreement in the IC case in this proceeding.

[100] The intent of the settlement agreement was to once and for all resolve the dispute between the plaintiff and the first defendant which was pending in the IC. However, by including the three documents in the present proceeding, the plaintiff is attempting to reopen the issues in the IC case contrary to the terms of the settlement agreement. The court ought not to assist the plaintiff in its attempt to do that.

[101] In *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489; [1999] 3 CLJ 577, the respondent claimed a sum of RM440,000 for compensation for a warehouse which was built illegally on the respondent's land upon the land being compulsorily acquired under the Land Acquisition Act 1960. The High Court allowed his claim. The appellant's appeal to the Court of Appeal was allowed on the ground that a party should not be permitted to take advantage of his own breach.

[102] Gopal Sri Ram JCA (later FCJ) who delivered the judgment of the Court of Appeal said as follows at pp 492 (MLJ); 581 h–i (CLJ):

> Quite apart from the construction of para 1(3)(b) of the First Schedule, *there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach*. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1. (Emphasis added.)

[103] There is a decision emanating from a court in Northern Ireland which has facts similar to the facts of the instant case. In my view the decision in that case, namely, *Brian Mcteggart v Waterways Ireland & Anor* [2009] NIQB 44 is relevant and can be adopted and applied to the facts and circumstances of the instant case.

[104] In that case the first defendant applied for an order pursuant to O 18 r 19 of the Northern Ireland Rules of the Supreme Court 1980 and under the inherent jurisdiction of the court to strike out the plaintiff's claim on the ground that it is vexatious, might prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the process of the court.

[105] The material facts show that the first defendant was the employer of the plaintiff since 2000. On 16 January 2006, the plaintiff commenced his action by writ in the High Court. It was apparent from the pleadings that the plaintiff's claim against the first defendant was for damages for personal injuries, loss and damage allegedly sustained by him during the course of his employment with the first defendant based on negligence, breach or contract and breach of article 3 of the Protection from Harassment (NI) Order 1997.

[106] The plaintiff's employment with the first defendant had already been the subject of litigation by way of a claim to an employment tribunal. That litigation, however, was settled and the terms of the settlement were set out in a compromise agreement which was dated 23 September 2007.

[107] The terms of the compromise agreement provided, inter alia, that the first defendant would pay the plaintiff GBP50,000 without admission of liability and (in para 3) in full and final settlement of all claims save only for the plaintiff's claim in the High Court.

[108] Paragraph 3 (which is reproduced in the judgment of Treacy J) reads as follows:

> The payment referred to in para 1 above is in full and final settlement of all claims which the claimant has or may have against the respondent, its servants or agents or either of its sponsoring departments in Northern Ireland or the Republic of Ireland, their servants or agents arising out of his period of employment/secondment with Waterways Ireland between 23 February 2000 and 15 December 2004 and the termination thereof save only for. (a)The claimant's action in the High Court of Northern Ireland against Waterways Ireland, the Department of Culture, Arts and Leisure (Writ No 2006/2865) …

[109] Paragraph 5 of the compromise agreement stated that the claimant had received independent legal advice from his senior counsel and solicitor as to the terms and effect of the 'compromise agreement' and the 'compromise agreement' was then signed by and /or on behalf of both parties.

[110] The learned judge refused the application of the first defendant to strike out the plaintiff's action in the High Court by virtue of the savings clause contained in para 3 of the compromise agreement which had expressly

preserved the plaintiff's action in the High Court. The learned judge held that the court would not exercise a power the effect of which would be to undermine the express terms of a written compromise agreement freely entered into by the parties with the benefit of legal advice.

[111] In arriving at the said decision the learned judge said as follows:

> [19] Clause 3 of the compromise agreement set out above confirms that the terms of the agreement were in full and final settlement of all relevant claims apart from the present High Court claim. This was an Agreement freely entered into by both parties who were represented by solicitors and junior and senior counsel on either side. The terms of cl 3 could not, in my opinion, be clearer. The express written intention of the parties was to preserve the plaintiff's High court claim. As I have already noted before at the time this compromise agreement was entered the first defendant was fully aware of the scope of the allegations which were said to underpin the claims in negligence, breach of contract and breach of article 3 of the Protection from Harassment (NI) Order 1997. This is because they had in their possession from April 2007 (many months before the compromise agreement) the terms of the detailed statement of claim which was submitted in respect of the High Court claim. The fact that the loss and damage claimed in the High Court claim had not been particularised at that stage and that an amendment was permitted much later does not alter the position. *The defendant signed up to the clear terms of an agreement to preserve the High Court claim. If this application (brought well over a year after the compromise agreement had been signed) were to succeed the first defendant would, in my opinion, be effectively permitted to renege on cl3 of the agreement. In order to achieve this objective the first defendant seeks to invoke the power of the court. This court will not lend itself to the exercise of a power the effect of which would be to undermine the express terms of a written compromise agreement freely entered into by the parties with the benefit of legal advice.* (Emphasis added.)

[112] Similarly here, since both parties had entered into the settlement agreement with the benefit of legal advice and with the aid of counsels, this court ought not to lend its power in order to assist the plaintiff to breach the terms of the settlement agreement by allowing the three documents to be used and/or referred to in the trial of the plaintiff's present suit against the defendants for slander, malicious falsehood and conspiracy to injure.

THE CONCLUSION

[113] In view of the reasons as set out above, I am of the respectful view that the decision of this court in deciding the preliminary issues in favour of the first defendant is fair and just based on the undisputed facts and the established relevant principles of law which are applicable and were within my discretion to

make in order to ensure a just, expeditious and economical disposal of the plaintiff's suit at the full trial pursuant to O 34 r 2(2)– (3) of the Rules of Court 2012.

Claim dismissed.

Reported by Afiq Mohamad Noor